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IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

STATE OF NEW JERSEY, ET AL.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the Utility Air Regulatory Group ("UARG") hereby incorporates by reference the disclosure statement filed with its petition for a writ of certiorari on September 17, 2008.

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INTRODUCTION

The U.S. Environmental Protection Agency ("EPA" or "the Agency") is authorized to regulate hazardous air pollutant ("HAP") emissions from electric generating units ("EGUs") under § 112 of the Clean Air Act ("CAA" or "the Act") *only* where EPA has determined pursuant to CAA § 112(n)(1)(A) that "such regulation is appropriate and necessary." In March 2005, the Agency determined, following notice-and-comment rulemaking, that regulation of EGUs was neither "appropriate" nor "necessary."

Nevertheless, the D.C. Circuit held that the requirements promulgated by EPA under CAA § 111, limiting EGU emissions of one particular HAP (*i.e.*, the "Clean Air Mercury Rule" or CAMR), were unlawful, and that the Agency was required instead to conduct a rulemaking to establish HAP standards for EGUs under CAA § 112(d). Only at the conclusion of this rulemaking, the D.C. Circuit ruled, could UARG seek to have the resulting "[un]necessary" and "[in]appropriate" CAA § 112(d) standards set aside on the ground that, given EPA's March 2005 determination, the entire process had been illegal from the outset.

According to the D.C. Circuit, this bizarre waste of time and resources – and the vacatur of the CAMR, the only set of federal requirements ever adopted for regulating EGU mercury emissions – is mandated by the "plain language" of the CAA and, thus, reflects the "unambiguously expressed" intent of Congress under *Chevron* step one. As Judge Tatel put it:

> "[M]aybe that's what Congress intended" – *i.e.*, for EPA to "go through a standard setting process that

> the Agency itself admits is wrong."

See App. 232a.

The D.C. Circuit said it was able to detect this supposed "unambiguously expressed intent" of Congress in a three-word phrase (*i.e*, "any source category") contained in a single sentence in subparagraph (B) of CAA § 112(c)(9). The court said it therefore had no reason to consider any other provision of CAA § 112, including the provision that specifically governs regulation of EGUs, CAA § 112(n)(1)(A).

The myopic approach to statutory interpretation employed by the D.C. Circuit resulted in the court's failing to recognize that *any* regulation of EGUs under CAA § 112 (including their "listing" as a source category under CAA § 112(c)) was not authorized, given EPA's determination in March 2005 that such regulation was neither "appropriate" nor "necessary." Moreover, the D.C. Circuit's circumscribed focus on a fragment of CAA § 112(c)(9) caused the court to overlook (1) that it had rested its decision on a provision of the Act that is irrelevant to the question at hand; (2) that, apart from its being irrelevant, CAA § 112(c)(9) does not even say what the court wants it to say; and (3) that *another* provision of CAA § 112 that was ignored by the court (*i.e.*, CAA § 112(c)(1)) authorizes EPA's so-called "de-listing" of EGUs. *See* UARG Petition at 24-27.

Respondents argue that "[n]either EPA nor UARG makes a viable case that the court of appeals committed error in finding that Congress has directly spoken to the issue" at hand. *See* Respondents' Brief in Opposition ("Opposition") at 16. They further contend that, "[g]iven the specific statutory language and context at issue," the D.C. Circuit's decision "has no gen-

eral legal or practical importance to agency decision-making." *Id.*

On the contrary, it is not too much to expect that, before the D.C. Circuit strikes down an EPA rule developed over the course of some five years and predicated on a massive record that was the most detailed ever developed by EPA to support regulatory action under CAA § 112, the court would at a minimum take account of *all* of the relevant statutory provisions. That did not happen here.

ARGUMENT

The D.C. Circuit identified, in isolated language in CAA § 112(c)(9), an "unambiguous" command that EPA must keep a source category on the CAA § 112(c) list, and proceed to regulate that source under CAA § 112(d), even where the statutory threshold for initiating regulation under CAA § 112 is not met. In the case of sources other than EGUs, EPA can regulate under CAA § 112(d) *only* if they are in a "major source category" that is listed under CAA § 112(c). Under the D.C. Circuit's reading of the Act, once a source category is listed as a "major source category," based upon a preliminary finding that the source category contains "major sources," EPA *must* adopt CAA § 112(d) standards for that source category notwithstanding a subsequent finding by the Agency that the source category in fact contains *no* "major" sources." *See* App. at 18a-19a.

As for EGUs, EPA can regulate those sources under CAA § 112 *only* if such regulation is found by the Agency pursuant to CAA § 112(n)(1) to be "appropriate and necessary." The D.C. Circuit held, however, that EPA's listing of EGUs under CAA § 112(c), based on a preliminary notice ostensibly made pursuant to CAA § 112(n)(1)(A), precludes the Agency thereafter

from (i) determining through rulemaking that regulation of EGUs under CAA § 112 is neither "appropriate" nor "necessary," and (ii) choosing instead to regulate EGUs under another provision of the CAA (*i.e.*, the CAMR).

For the reasons discussed below, review is needed to correct an approach to *Chevron* step one that has become an established part of D.C. Circuit jurisprudence. Review is needed to reject an interpretation of the CAA under which preliminary Agency action is given the effect of a legislative rule that cannot be repealed.

I. This Court Should Put an End to the D.C. Circuit's Misapplication of *Chevron*.

This case is but a recent (although the most egregious) example of the D.C. Circuit's propensity in the past few years to invoke what it claims to be a *Chevron* step one analysis in order to strike down an EPA rule with which the court disagrees. *See* UARG Petition at 20-21. In each instance, the D.C. Circuit has seized on a particle of statutory text in claiming to have discerned "unambiguously expressed" congressional intent. This Court should use this case to put an end to this D.C. Circuit practice, which distorts the *Chevron* doctrine and which has occasioned a serious and unjustified disruption of EPA's legitimate exercise of its discretionary rulemaking authority.

Chevron instructs that a reviewing court is to "employ[] traditional tools of statutory construction" in order to "ascertain[] whether . . . Congress had an intention on the precise question at issue." *See Chevron v. NRDC*, 467 U.S. 837, 843 n.9 (1984). Among those "traditional tools" are the interrelated principles that

a reviewing court "should not confine itself to examining a particular statutory provision in isolation;"[1] that, in "expounding a statute," a court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy;"[2] and that a "cardinal rule" of statutory construction is that a "statute it to be read as a whole," since the "meaning of statutory language, plain or not, depends on context."[3] The D.C. Circuit abandoned these principles in this case, just as it had in the earlier decisions that UARG cited. *See* UARG Petition at 20-21.

Respondents claim that a "reading of those decisions . . . reveals" that the D.C. Circuit "employed a conventional approach to statutory construction consistent with *Chevron*," and that, as a result, UARG "fails to show more" than that it "simply disagrees with a selection of cases in which the court of appeals found EPA's actions inconsistent with the statutory text." Opposition at 21. Those decisions speak for themselves. But it bears repeating that it defies credulity to imagine that Congress could so often convey unambiguous intent on such complex subjects through isolated words or fragments of phrases. *See* UARG Petition at 21.

Through its singular focus on three words in CAA § 112(c)(9), the D.C. Circuit was able to dismiss CAA § 112(n)(1)(A) out of hand, asserting that that section "says nothing about delisting EGUs," and that the

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[1] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

[2] *See Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

[3] *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

"plain text of section 112(c)(9) specifies that it applies to the delisting of 'any source.'" *See* App. 16a. But no one disputes that an "appropriate and necessary" finding under CAA § 112(n)(1)(A) is the ***statutory prerequisite*** for EPA's undertaking ***any*** regulation of EGUs under CAA § 112. The D.C. Circuit offered no explanation as to how EPA could possibly be precluded from removing EGUs from the list of source categories under CAA § 112(c) – and, in turn, be forced to regulate EGUs under CAA § 112(d) – when at the same time the Agency had concluded after extensive rulemaking that regulation of EGUs under CAA § 112 was neither "appropriate" nor "necessary."

Respondents argue that "once EPA determined [*i.e.*, in December 2000] that regulation of EGUs under [CAA § 112] was appropriate and necessary and placed power plants on the [CAA § 112(c)] list," CAA 112(n)(1)(A)'s "function was at an end." Opposition at 22. They further assert that CAA § 112(n)(1)(A) "contemplates a single determination" based upon the statutorily-mandated Utility Study, and that EPA was somehow barred by the CAA from subsequently determining (as it did in this case), following rulemaking and based on new information, that the December 2000 notice was "without foundation." *Id.* at 23.

Respondents offer no explanation for this construction of CAA § 112(n)(1)(A), the plain language of which supports no such interpretation.[4] Even more

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[4] As for Respondents' claim that, when EPA issued its March 2005 determination, it "did not assert any new scientific understanding of EGU HAPs and their public health or environmental impact," Opposition at 12, the administrative record shows otherwise. When EPA issued its December 2000 notice, it based that action on the finding of a "plausible link

(Continued . . . .)

significantly, Respondents' attempt to prop up the D.C. Circuit's decision by resorting to an analysis of CAA § 112(n)(1)(A) underscores the court's misapplication of *Chevron* step one. Respondents cannot plausibly contend that the D.C. Circuit "employed a conventional approach to statutory construction consistent with *Chevron*," Opposition at 21, while at the same time they implicitly acknowledge that the court's decision can only be justified (if at all) when considered in light of statutory language that the court itself found unnecessary to engage.

II. The Decision Below Embraces an Approach to Statutory Construction That Conflicts with Fundamental Principles of Administrative Law and *Thomas v. New York*.

If "preliminary findings announced without rulemaking" could "compel future administrations to establish new regulatory programs," then "new regulatory policy could be mandated without any accountability or opportunity for correcting that finding." *See* UARG Petition at 28. By effectively determining that EPA could not revisit its December 2000 notice, and

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between methylmercury concentrations in fish and mercury emissions from coal-fired" EGUs. *See* App. at 38a. At the same time, EPA acknowledged that the "degree to which that linkage occurs cannot be estimated quantitatively now." *Id.* In other words, EPA acted in December 2000 on a scientific theory that it could not then verify. Subsequently, in making its March 2005 determination, EPA relied upon detailed modeling to quantify the linkage between mercury emissions from coal-fired EGUs and methylmercury in fish. This modeling, which is reported in over 1,000 pages of technical reports, shows that mercury emissions from EGUs have an insignificant effect on methylmercury levels in fish. *See* App. at 138a-167a.

requiring the Agency to proceed to regulate EGUs under CAA § 112(d), the D.C. Circuit construed the CAA contrary to its own precedent in *Thomas v. New York*, 802 F.2d 1143 (D.C. Cir. 1986).

Recognizing the significance of *Thomas*, and the problem it poses for the D.C. Circuit's approach to statutory construction here, Respondents seek to reconcile the two cases by claming that EPA's December 2000 notice was itself a "rule." To that end, they argue that, in issuing its March 2005 determination, "EPA not only disagreed with the December 2000 finding," but "concluded that that its finding was invalid *when made* and therefore ineffective to have subjected EGUs (and EPA) to the provisions" of CAA § 112. Opposition at 18 (emphasis in original). According to Respondents, "EPA's reversal of its December 2000 determination and listing . . . was an attempt *to reverse and expunge a rule*, which is little more than retroactive rulemaking." *Id.* (emphasis added).

But EPA's December 2000 notice was not a "rule." While Respondents claim that that notice was issued following "extensive opportunity for public comment," Opposition at 22, the requests for comment made before the December 2000 notice were not on a proposed CAA § 112(n)(1)(A) finding, but were akin to advance notices of proposed rulemaking. No specific finding or action under CAA § 112(n)(1)(A) was ever proposed in these opportunities for public comment. EPA never offered a legal interpretation of the terms "appropriate" and "necessary;" it never explained why an "appropriate and necessary" finding under CAA § 112(n)(1)(A) required listing of EGUs under § 112(c); and it never identified its legal authority to regulate *all* EGU HAP emissions under CAA § 112(d) when

the Agency only found a public health "concern" resulting from the emission of mercury.

And, as noted above, the Agency had not yet been able to estimate the "degree to which . . . [a] linkage occurs" between "methylmercury concentrations in fish and mercury emissions from coal-fired" EGUs, the penultimate issue in the March 2005 determination. By contrast, when EPA conducted the rulemaking that culminated in that subsequent determination, it solicited comment on all of these issues and fully explained its legal rationale. *See supra* note 4.

Further, as EPA represented to the D.C. Circuit, the December 2000 notice was not even "final agency action," must less a "rule" adopted through notice and comment rulemaking. *See* App. at 56a. It was on this basis that the D.C. Circuit granted EPA's motion to dismiss UARG's petition for review of the December 2000 notice, with the court agreeing with EPA that "the decision to add" EGUs "to the source category list [was] *not yet final agency action*." *Id.* (emphasis added).

Respondents further argue that neither *Thomas* nor the "general authority of administrative agencies to reverse course on policy matters" is "implicated" by the D.C. Circuit's decision, because the "specific statutory language plainly provides otherwise." Opposition at 16. The "specific statutory language" to which Respondents refer includes CAA § 112(e)(4), which provides, in relevant part, that "no action of the Administrator . . . listing a source category . . . under subsection (c) of this section . . . shall be final agency action subject to judicial review," except that "any such action may be reviewed . . . when the Administrator issues emission standards for such . . . category." According to Respondents, the D.C. Circuit's conclusion that EPA must adopt HAP emission stan-

dards for EGUs, even though the Agency has determined under CAA § 112(n)(1)(A) that such regulation is neither "necessary" nor "appropriate," is supported by Congress's direction in CAA § 112(e)(4) that judicial review of "listing" decisions under CAA § 112(c) is available only following the promulgation of standards under CAA § 112(d). *See* Opposition at 20.

But CAA § 112(e)(4) cannot bear the weight that Respondents would place upon it. While this provision may direct that judicial review of a "listing" decision for a source category is only available after a standard has been established, this cannot be construed as a statutory mandate that such a standard *must* be adopted notwithstanding a rulemaking determination by EPA that the listing decision itself lacked lawful basis. Such a construction of CAA § 112(e)(4) implicitly assumes that Congress intended a fundamental departure from basic principles of administrative law and from the rulemaking requirements of CAA § 307(d). No such intent can be inferred on the face of CAA § 112(e)(4).

For its part, the D.C. Circuit reasoned that the "listing" of EGUs under CAA § 112(c), in and of itself, somehow compelled EPA to proceed to adopt CAA § 112(d) standards. In truth, the opposite is the case: EPA's determination in Marhc 2005 *not* to regulate EGUs under CAA § 112 necessarily entailed that the continued presence of EGUs on the CAA § 112(c) "list" of source categories subject to regulation under CAA § 112 was no longer authorized. The removal of EGUs from the list was, in other words, a detail, a regulatory correction purely incident to EPA's March 20005 determination.

III. The Alleged "Uncertainty" of the Rules that Underpinned EPA's March 2005 Provides No Reason for This Court to Decline Review.

Even though the D.C. Circuit expressly declined to address the merits of EPA's March 2005 determination, Respondents argue that alleged "uncertainty" surrounding certain of the EPA rules upon which the Agency relied in reaching that determination (*e.g.*, the "Clean Air Interstate Rule," or CAIR, which was declared unlawful by the D.C. Circuit in July 2008) provides an additional reason for this Court to decline review. *See* Opposition at 25-28. As the validity of EPA's March 2005 determination is a matter that the court refused even to address, Respondents' contention that it "seems highly doubtful that EPA could today affirm" that determination, *id.* at 26, can hardly provide a reason for this Court to decline review.

More importantly, no matter how the "uncertainty" regarding the CAIR is eventually resolved, the result will be *more stringent* emission reduction requirements on EGUs, resulting in even greater indirect reductions in EGU HAP emissions than those EPA took account of in its March 2005 determination. Thus, the D.C. Circuit's CAIR decision does not in any way "cast[] into doubt the entire foundation upon which EPA relied in promulgating the rules at issue" here. See Opposition at 25.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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